AWALUDDIN SURATMAN & ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHTAR ABDULLAH J
[APPEAL NO. CR 52-36/37/39-88]
6 MAY 1991

CRIMINAL PROCEDURE: *Unrepresented accused - Not informed of right to object to cautioned statement - Duty of a trial Judge to the accused - Purpose of a trial within a trial - Mistrial - Criminal Procedure Code, s. 113 - Evidence Act 1950, s. 27.*

LEGAL PROFESSION: *Conduct of defence Counsel - Interests of client prejudiced.*

The first appellant was charged under s. 467 of the Penal Code with forging four cheques belonging to MPPJ. The second and third appellants were charged with abetment. They were tried jointly and convicted by the Sessions Court. The first appellant appealed against sentence, whilst the other appellants appealed against conviction and sentence.

Held:

[1] Although there is no procedural requirement for the Sessions Court Judge to inform an unrepresented accused person of his right to object to the admission of an oral cautioned statement, the Judge should have realised that the question of admissibility is a legal issue which a layman does not comprehend.

[2] Where an accused person is without Counsel, the duty of a trial Judge to hold a fair and even balance between the prosecution and the undefended accused person is difficult and onerous. In such a situation, the trial Judge must not allow the prosecution to take an unfair or undue advantage over an undefended accused person.

[3] The application of the prosecution to revoke the bail of the two appellants indicates a harsh attitude on its part that is clearly not consonant with justice and fair play.

[4] The whole of the prosecution case against the first appellant rested on the appellant's cautioned statement; without it, the prosecution had no case at all against him.

[5] The subsequent trial within a trial conducted after the disputed cautioned statement had been tendered in evidence is improper and not in accordance with law. A trial within a trial is conducted to determine the admissibility of a cautioned statement. It is not a proceeding to regularize or justify the admission of a statement that had already been recorded in evidence.

[6] It is salutary practice for a trial Judge to explain to an undefended accused the main points of a prosecution witness' testimony so as to enable the accused to properly cross-examine such witness. This was not done in the instant case.

[7] In view of these circumstances, there had been a mistrial in this case. The record showed that the trial had not been conducted in accordance with proper legal procedures or in a manner conducive to fairness and justice. The conduct of the defence Counsel (who abandoned his client in the midst of the trial) was quite disgraceful and had prejudiced the interests of his client. Likewise, the conduct and actions of the Deputy Public Prosecutor and the learned Sessions Court Judge were also not beyond reproach.

[Conviction of first appellant quashed; sentence set aside. Appeal by second and third appellants against their conviction allowed; sentence set aside. Second and third appellants to be retried before a different Sessions Judge.]

Legislation referred to:
Criminal Procedure Code, ss. 113, 257(i)
Evidence Act 1950, ss. 27, 157
Penal Code, ss. 109, 467, 471

For the Public Prosecutor - Ng Aik Guan, Deputy Public Prosecutor
For the 1st & 3rd Appellants - Rajinder Singh
For the 2nd Appellant - Charanjit Singh

JUDGMENT

Mohtar Abdullah J:

Oleh kerana perbicaraan di Mahkamah Sesyen dijalankan dalam Bahasa Inggeris, dan segala rekod rayuan (iaitu nota-nota keterangan dan penghakiman oleh Hakim Mahkamah Sesyen) adalah dalam Bahasa Inggeris juga, maka saya menggunakan budibicara saya untuk menyampaikan penghakiman ini dalam Bahasa Inggeris untuk memudahkan rujukan kepada nota-nota keterangan dan penghakiman berkenaan.

The first appellant was charged on four counts under s. 467 Penal Code for forging four MBB cheques belonging to MPPJ (hereinafter referred to as "the forged cheques") to a total value of RM1,956,700.

The second and third appellants were jointly charged as follows:

(a) on one count under ss. 109/471 Penal Code for abetting one Basharihafi bin Abdul Rashid in the commission of dishonesty using as genuine one of the forged cheques; and

(b) on three counts under ss. 109/471 Penal Code for abetting one Mohamed Nasri bin Mansor in the commission of dishonestly using as genuine the three other forged cheques.

On the application by the learned Deputy Public Prosecutor, the learned Sessions Court Judge ordered a joint trial for all three appellants. All three appellants were subsequently found guilty and convicted on all the charges preferred against them. The appellants were sentenced to imprisonment for concurrent terms ranging from four years to seven years. The first appellant was fined a total of RM20,000 while the second and third appellants were fined a total of RM18,000 each.

The first appellant has now appealed against sentence, while the second and third appellants appealed against both conviction and sentence. At this appeal the second appellant is represented by Mr. Charanjit Singh - in the Sessions Court he was represented by Mr. A. Anthony. The first and third appellants were represented by a Mr. Bernatt who at various stages during the trial had discharged himself, later acted again for these two appellants and subsequently discharged himself towards the end of the trial. I shall be commenting on this later in my judgment. When this appeal was first mentioned on 27 April 1991 the first appellant was unrepresented. In fact he filed his appeal papers from the prison. The third appellant is now represented by Mr. Rajinder Singh, who has also kindly agreed to also act for the first appellant in this appeal. The same learned Deputy Public Prosecutor appeared both at the trial and at this appeal on behalf of the public prosecutor. I subsequently heard this appeal on 2 May 1991.

Let me, at the onset, say that certain aspects of this trial are quite disturbing and I had accordingly reserved judgment to today to enable me to carefully ponder on these unsatisfactory features of the trial. In the course of this judgment, I shall refer extensively to the notes of evidence contained in the appeal record.

After eight prosecution witnesses had given evidence, the record shows as follows:

Page 66 of the appeal record:

2 March 1987: OKT1 dan 2 hadir.
TPR Mr. Ng.
Alex Anthony bagi OKT1.

Court: Ditanggohkan sekejap.
Sgd. Zura bt. Yahya
Mahkamah bersidang semula.
Ketiga OKT hadir.
TPR Mr. Ng.
A. Anthony bagi OKT2
Ms. Thong holding watching brief.
Peguambela OKT1 dan 3 tidak hadir.

OKT3: Saya ada menerima salinan surat daripada Encik Bernatt mengatakan dia ingin menarik diri untuk membela kes ini.

OKT1: Saya belum menerima salinan surat daripada peguambela saya.

PW9: Chief Inspector K.S. Nathan affirmed, states in English.

From the above-mentioned notes it is clear that although Counsel for the first and third appellants was absent and had indicated he would be discharging himself, the learned Sessions Court Judge proceeded with the trial in the absence of any Counsel for the two appellants. The records do not show whether the two appellants applied for a postponement to seek the continued service of Mr. Bernatt or to seek new Counsel(s) to defend them. The learned Deputy Public Prosecutor immediately called his most important witness, his star witness, Chief Inspector K.S. Nathan (PW9), the investigating officer of this case. The learned Deputy Public Prosecutor promptly introduced into evidence that PW9 arrested the first appellant on 21 July 1983 at the MPPJ office in Petaling Jaya and that after being cautioned under s. 113 Criminal Procedure Code, the first appellant made an oral cautioned statement confessing to the theft of four spoiled or cancelled cheques, writing out these cheques and forging the signatures of the President and Treasurer of the MPPJ. The content of the oral cautioned statement of the first appellant was given in evidence through PW9. In fairness to the first appellant who was without Counsel then and who may not (as apparent in this case) have known or understood his rights to object to the admission of the said oral cautioned statement, the learned Deputy Public Prosecutor should have refrained from proceeding with the testimony of PW9 at this stage. The learned Sessions Court Judge, in fairness to the first appellant, should have restrained the learned Deputy Public Prosecutor from introducing the contents of the cautioned statement until after she had ascertained from the first appellant whether he was objecting or not to the admission of the said oral cautioned statement. Though there is no procedural requirement for the learned Sessions Court Judge to inform an unrepresented accused person of his right to object to the admission of such statement, the learned Sessions Court Judge should have realised that the question of admissibility of a document or statement is a legal issue which a layman does not comprehend. In fact many a lawyer blunders on this issue! Where an accused person is without Counsel,

the duty of a trial Judge to hold a fair and even balance between the prosecution and the undefended accused person is even more difficult and onerous. In such a situation, a trial Judge must not allow the prosecution to take an unfair or undue advantage over an undefended accused person like the first appellant whose Counsel had abandoned him in his greatest hour of need!

The learned Counsel for the second appellant who was present throughout the proceedings merely kept quiet. The record does not show him to act as an officer of the Court to bring to the learned Sessions Court Judge's attention the dire predicament of the first appellant. It was only at the stage when PW9 said that all the forged cheques were handed over to the second appellant did the learned Counsel for the second appellant make an objection, as regards that part of evidence affecting his client. It was also on this stage that the first and third appellants applied to the Court to seek the service of their Counsel.

Pages 68-69 of the appeal record:

A. Anthony: I wish to make objection as regards to this part of the evidence - need time to do so.

OKT1 dan 3: Memohon untuk menemui peguambela saya untuk memastikan perkara ini.

Court: Sambung bicara pada petang esok pukul 2.15 petang.
Sgd. Zura bte Yahya.

T.P.R.: Applying to have bail cancelled against the first and third accused. First accused - RM20,000 and one surety, third accused RM20,000 and two sureties.

A. Anthony: If bail is cancelled it would be more difficult for them to contact their lawyer. They have been attending Court regularly. I.O. confirmed that the passports of the third and second accused are in his custody. First accused does not have any passport.

Court: Application by the prosecution refused.
Sgd. Zura bte Yahya.

I quote the above passages to show also the attitude of the learned Deputy Public Prosecutor. Instead of compassion for the two appellants who were merely seeking time to obtain the service of Counsel, the learned Deputy Public Prosecutor sought to cancel their bail. The record does not show his reasons for doing so. It would, however, be apparent to anyone with sufficient common sense to realise that, with their bail revoked, the two appellants, who would then be remanded in custody, would have great difficulty in contacting Counsel. As I said before, the learned Deputy Public Prosecutor must be fair and not take undue advantage of the two appellants who were left stranded high and dry by their Counsel. This application by the learned Deputy Public Prosecutor to revoke the bail of the two appellants indicates a harsh attitude on the part of the prosecution that is clearly not in consonant with justice and fair play.

On the next day when the trial resumed, Mr. Bernatt appeared and informed the Court that his clients had requested him to continue to act for them and that he was agreeable to do so. No reason was given to the Court as to why he was absent the previous day or why he had discharged himself then. No apology was tendered as to his absence the previous day. He applied for the notes of evidence and the case was adjourned to enable both the prosecution and defence to be supplied with the relevant notes of evidence. On 25 March 1987 when the trial resumed, Mr. Bernatt objected to the admission of the said oral cautioned statement of the first appellant. The learned Sessions Court Judge then ordered for a trial within a trial to be held to determine admissibility of the oral cautioned statement which had

already been recorded in evidence. At the end of a lengthy trial within a trial, the learned Sessions Court Judge ruled that the said oral cautioned statement was admissible in evidence. She also ruled that the investigation diary of PW9 containing the record of the said statement be also admitted to the evidence under s. 157 of the Evidence Act to corroborate the oral testimony of PW9 regarding the first appellant's cautioned statement.

The whole of the prosecution case against the first appellant rested on this cautioned statement - without it the prosecution had no case at all against the first appellant. Apart from my comments as to the conduct of the learned Deputy Public Prosecutor, the learned defence Counsel (Mr. Bernatt) and also the learned Sessions Court Judge, I am also of the view that the subsequent trial within a trial conducted after the disputed cautioned statement had been tendered in evidence is improper and not in accordance with law. A trial within a trial is conducted to determine the admissibility of a cautioned statement. It is not a proceeding to regularize or justify the admission of the statement that had already been recorded in evidence!

On 17 November 1987, in the course of a trial within a trial to determine the admissibility of a written cautioned statement by the third appellant, Mr. Bernatt again played his disappearing act.

Pages 122-123 of the appeal record:

17 January 1987: Ketiga OKT hadir.
DPP Mr. Ng.
Alex Anthony - peguambela OKT 2.

OKT3: Saya diberitahu oleh Encik Bernatt bahawa beliau mempunyai kecederaan pada kakinya - tidak boleh hadir ke mahkamah.

DPP: Since Counsel has written in to Court that he has discharged himself as Counsel and no change in respect of his contention has been indicated to the Court, the prosecution is ready to proceed with the case.

Anthony: I have not been in communication with Mr. Bernatt. May the case be stood down for a day.
Court has not received any call from Mr. Bernatt to clarify as to the position (interpreters have not received any call).

Court: To proceed with the hearing of this case.
Sgd. Zura bte Yahya

OKT: Jika betul peguambela menarik diri saya ingin mencari peguambela yang baru.

Court: Penanggohan tidak dibenarkan.
Sgd. Zura bte Yahya

Chief Inspector Nathan was called as EW2 (EW1 being WI Hamison bt. Buyong, PW10, who recorded the third appellant's cautioned statement). After the examination-in-chief of EW2, the record, at p. 124, shows as follows:

Cross-examination:

OKT1: Saya tidak memahami. Saya tidak dapat memberi keputusan.
Cross-examination (by Mr. Anthony):
Nil.
Cross-examination:

OKT3: Saya memilih untuk berdiam sehingga mendapat peguambela yang baru.

The learned Sessions Court Judge ordered the case to be stood down (that is adjourned to the next day (18 November 1987)). On the said date, the third appellant produced a letter from Mr. Bernatt, requesting for a postponement. Finally, on 4 January 1988, a Mr. Vadiveloo appeared for the first appellant while Mr. Bernatt appeared and remained as Counsel for the third appellant.

Page 125 of the appeal record:

Vadiveloo: Due to some conflict the first accused was asked to get a new solicitor and I have just been retained. Request for a short adjournment to enable me to obtain the notes of evidence.

Mr. Ng: Objecting to this application for another postponement:

1. What is the conflict between the accused?

2. When the matter came up in November 1987 and two days set aside, parties informed case would proceed with or without Counsel.

In the light of the previous proceeding this is another attempt to protract the proceeding.

Court: Request for adjournment not allowed.
Sgd. Zura bte Yahya

DPP: I am now calling my second inquiry witness for cross-examination.

In my view, as Mr. Vadiveloo had just been retained, a short adjournment would further the interest of justice as Mr. Vadiveloo needed the notes of evidence to be better and properly prepared to safeguard the interests of the first appellant. Though the Court should be strict in dealing with applications for postponements, the Court owes a duty, too, to an accused person to ensure that he has the benefit of Counsel who would be properly able to act on his behalf. (Later turn of events show that the first appellant would soon be abandoned by his second Counsel, and once again he would fall back into the arms of Mr. Bernatt who would disappoint him yet again).

EW2, Chief Inspector Nathan was then cross-examined by Mr. Bernatt. There was no cross-examination done by Mr. Anthony and Mr. Vadiveloo (see p. 128). When the case for the prosecution in respect of the trial within a trial was closed, the defence called the third appellant (DEW1) to testify. After hearing submission by all parties, the learned Sessions Court Judge ruled that the cautioned statement of the third appellant be admissible in evidence (p. 147). WI Hamison (PW10) was recalled and the said cautioned statement was then tendered and marked as P57.

On 29 March 1988, the record shows that Mr. Vadiveloo had discharged himself and Mr. Bernatt again acted for the first appellant.

Page 152 of the appeal record:

29 March 1988: Ketiga OKT hadir.
DPP Mr. Ng.
Ms Thong holding watching brief for MBB.

OKT1: Peguambela saya Encik Vadiveloo menarik diri dan sekarang Encik Bernatt peguambela saya. Dia tidak dapat hadir hari ini sebab berada di Mahkamah Tinggi.

OKT3: Encik Bernatt berada di Mahkamah Tinggi sebab ada kes 'election petition'.

Mr. Alex: Encik Bernatt tidak ada menghubungi saya tentang perkara ini.

Mahkamah: Tidak ada menerima surat atau panggilan daripada Encik Bernatt.

Mr. Ng: Objection to request for further postponement - Court record shows concessions made by prosecution to ensure accused given ample opportunities for fair representation. Indeed Counsels acting for first and third accused to keep these dates opened and to be followed by submission. Prosecution has three witnesses - formal, and after this to proceed with submission.

Court: Postponement not allowed.

Again, the first and third appellants were left stranded without Counsel when the Court proceeded with the trial. PW13, PW14 and finally PW15 gave evidence, after which the prosecution closed its case. The case was adjourned to 11 April 1988 for submission. On the said date, Mr. Bernatt again failed to appear in Court.

Page 158 of the appeal record:

11 April 1988: Ketiga OKT hadir.
Mr. A. Anthony peguambela OKT 2.
P.O. ASP Chong menyebut bagi pihak DPP Mr. Ng.
Mr. Bernatt tidak hadir.

PO: Mr. Ng engaged in an important matter and he has instructed me to record the submission made.

Mr. Anthony: I have been informed by Mr. Bernatt that he is no longer acting for the first and third accused. I do not know whether he has sent any letter to that effect.

3rd Accused: I have not been informed by my Counsel that he has discharged himself.

Court: Stand down for a short while to enable first and third accused to contact Mr. Bernatt.
Sgd. Zura bte Yahya
Case called again.

3rd Accused: I contacted Mr. Bernatt, he is still my Counsel but not able to come to Court today or tomorrow. He requested for a week adjournment.

Court: A week's postponement is not allowed - either to be present in Court tomorrow morning to give the submissions or Court would proceed to give the decision since the hearing dates of this case has been fixed long ago.
Sgd. Zura bte Yahya

With that, the trial proceeded. Mr. Anthony then made his submission on behalf of the second appellant. The case was then adjourned to the next day (12 April 1988).

Pages 160-161 of the appeal record:

12 April 1988: Ketiga OKT hadir.
DPP Mr. Ng.
Alex Anthony peguambela OKT2.
Mr. Bernatt peguambela OKT1 dan 3 tidak hadir.

OKT1 dan 3 mengesahkan bahawa peguambela mereka tidak akan datang ke mahkamah pada hari ini.

OKT1: Tidak akan memberi hujah-hujah kepada mereka.

OKT3: Saya ingin memberi hujah-hujah saya.

Hujah-hujah OKT3:

> I am making my own submission in view of the absence of my Counsel Mr. Bernatt. I am very much regret, sorry that the last minute performance of my Counsel. Should not happened like this.

The third appellant then proceeded to make a brief submission. The learned Deputy Public Prosecutor then made a lengthy submission in reply.

The learned Sessions Court Judge held that the prosecution had established a *prima facie* case against all the three appellants and called them to enter their respective defence on all the charges against each of them respectively. After the three alternatives had been explained, the first appellant elected to remain silent, the second appellant elected to give evidence on oath while the third appellant is recorded to have said (at p. 165):

> I have not decided which alternative to take until obtained (*sic*) the advice of Counsel.

The trial was then adjourned to 13 April 1988. On the said day, the second appellant changed his mind and gave a statement from the dock. The first appellant still elected to remain silent, while the third appellant gave a statement from the dock. Both the first and third appellants were undefended at this stage. The records do not show whether s. 257 of the Criminal Procedure Code had been complied with. Section 257(i) reads:

> At every trial before the Court of a Magistrate if and when the Court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principle points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

It is also a salutary practice for a trial Judge to explain to an undefended accused the main points of a prosecution witness' testimony so as to enable the said accused to properly cross-examine such witness. The record again does not show this to be done!

At the close of the case for the defence, the first appellant said that he did not want to make any submission. Mr. Anthony then made a submission on behalf of his client (second appellant). The third appellant merely said:

> My submission is as that given by Counsel for the second appellant. I hope the Court will consider all my statement.

The learned Deputy Public Prosecutor then replied with a lengthy submission. On 18 April 1988, all the three appellants were found guilty, convicted and sentenced as aforesaid.

In my considered view, without even considering the merits of the various legal issues raised in this appeal, I am satisfied that there was a mistrial in this case. The record clearly shows that this trial had not been conducted in accordance with proper legal procedures or in a manner conducive to fairness and justice. The conduct of defence Counsel, Mr. Bernatt is, to put it bluntly, quite disgraceful and has, to my mind, prejudiced the interests of his clients, the first and third appellants. The courtroom is not a stage for Counsel to play act, to appear, disappear, reappear and disappear at his whim and fancy. A defence Counsel is also an officer of the Court - he owes a duty both to the Court and to his client. If a defence Counsel wants to discharge himself from further acting for an accused person, the decent and honourable thing for him to do is to inform the Court accordingly. Etiquette would demand that he appears in Court to formally discharge himself. If that is somewhat difficult for him to do, then he should at least write to the Court or inform the other Counsel accordingly. I

sincerely hope that the Bar Council or the Selangor and Federal Territory Bar Committee will seriously look into this matter and take appropriate disciplinary action to protect the integrity of the honourable legal profession and the dignity of the Courts.

As can be clearly seen from the record, the conduct and actions of the learned Deputy Public Prosecutor and the learned Sessions Court Judge are also not beyond reproach.

It is trite observation that justice must not only be done but must be seen to be done. The record does raise some doubt whether, in the circumstances of this case, the appellants (especially the first and third appellants) have had a fair trial.

In that respect their conviction can be said to be tainted. Though the second appellant had the benefit of Counsel throughout the trial, in view of the fact that this was a joint trial and incriminating evidence implicating him were contained in the cautioned statements of the first and third appellants, I am of the view, that his conviction too would be similarly tainted.

Decision

In respect of the first appellant, I exercise my power of revision and hereby quash the conviction of the first appellant on all the four charges against him and also set aside the various sentences of imprisonment and fines imposed on him.

As regards the third and second appellants, I allow their appeal against conviction and hereby quash their respective convictions on all the charges against them jointly and also set aside the various sentences and fines imposed on them.

In view of the mistrial, the proper consequential order would be a retrial of the appellants before another Sessions Court Judge. However, there was no stay of execution of sentence in respect of the first appellant who had, by today, been in prison for three years 19 days since the date of his conviction on 18 April 1988. I do not think a retrial would be fair and proper in the special circumstances of this case. In view of this extenuating circumstance, I shall not order a retrial for the first appellant. He is hereby acquitted and discharged and should forthwith be released.

However, in respect of the second and third appellants, I order that they both be retried before a different Sessions Court Judge on the joint charges against them. They are required to appear before the Sessions Court on 20 May 1991 for a date to be fixed for the retrial before another Sessions Court Judge. Bail is extended for this purpose.

I purposely do not make any observation or ruling on the substantive legal issues relating to the admissibility of the various documents and statements, *viz*., the cautioned statement of the third appellant, the information by the second appellant under s. 27 of the Evidence Act and the records of the trial/conviction of Basharihafi and Mohd. Nazri. These are best left to the new trial Judge to decide, unfettered by any observation or ruling by me. A fresh trial, as the Supreme Court recently declared, means that everything should be started afresh and all evidence should therefore be tendered afresh and decided upon accordingly by the new trial Judge.

Also found at [1991] 3 CLJ 2459